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No. 886294

IN THE
Supreme Court of the United States,
OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of All Package
Grocery Stores Company,

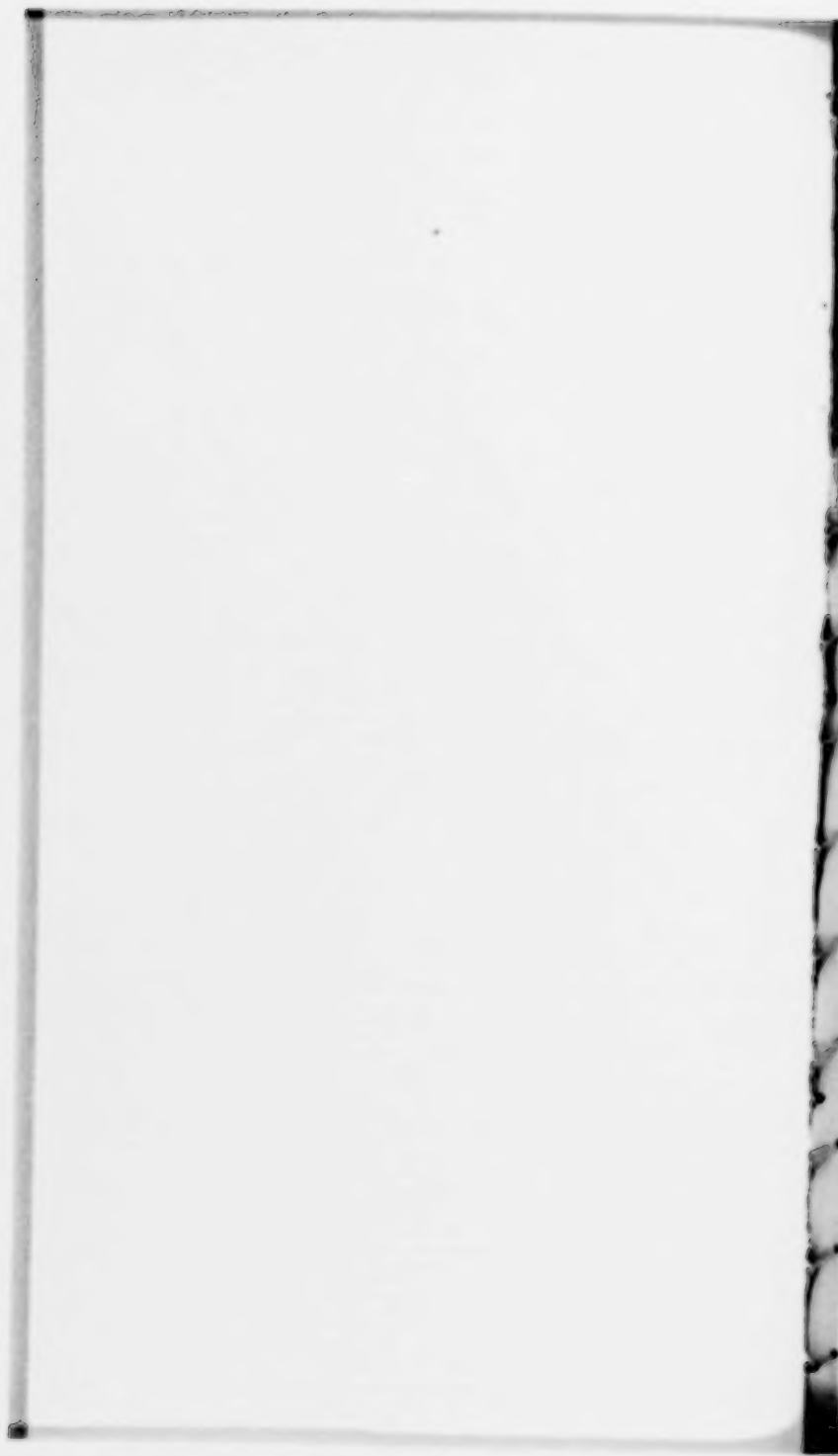
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF
IN SUPPORT THEREOF.

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.



IN THE
Supreme Court of the United States,

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of
All Package Grocery Stores Company,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW
YORK,
Respondents.

No.

Petition for Writ of Certiorari.

TO THE SUPREME COURT OF THE UNITED STATES:

The above named petitioner, H. Snowden Marshall, prays for a writ of *certiorari* to review a decree of the United States Circuit Court of Appeals for the Second Circuit in a cause entitled William L. Sweet, Jr. against All Package Grocery Stores Company.

Questions Presented.

1. Has the State of New York, upon the sole ground of *sovereign prerogative*, a lien, upon the property of a foreign corporation, for a license fee charged by the State

- 4 for the privilege of doing business therein when such property is under the exclusive jurisdiction of the Federal Courts in an equity suit.

2. Has the State of New York, in disregard of the limitations of its own statutes, a lien upon the property of a foreign corporation in the hands of a Federal receiver, in an equity suit, for the amount of a license fee, where the State fails in the performance of conditions precedent on the part of the State, required by the statute in order to secure such lien?

- 5 3. Was the Circuit Court of Appeals, in deciding the foregoing question, bound by the decisions of the courts of the State of New York; or, are they not questions of general jurisprudence upon which the Federal Courts are free to exercise their own independent judgment?

Statement of the Case.

Petitioner was appointed Receiver of the All Package Grocery Stores Company by the United States District Court for the Southern District of New York, in an equity suit in said Court brought by William L. Sweet, Jr., as a creditor of the Company, to conserve its assets.

- 6 William L. Sweet, Jr., the complainant in said cause, was and is a citizen and resident of the State of New York and of the Southern District of New York, and the said All Package Grocery Stores Company, the defendant in said cause, was and is a corporation organized under the laws of the State of Delaware and a citizen and resident of said State.

The ground of jurisdiction of the cause by the United States District Court was the said diversity of citizenship of the parties thereto, as more fully appears by the bill of

complaint filed therein, a certified copy of which is submitted herewith as an appendix to this petition. 7

The Delaware corporation succeeded to the assets and business of a New Jersey corporation of the same name.

The New Jersey corporation carried on business in New York and became indebted to the State of New York for a *license fee* of \$977.86 for the privilege of exercising its corporate franchise therein and for an *annual franchise tax* of \$259.70 on the capital actually employed by it in that State in 1915.

Thereafter the Delaware corporation carried on the business in New York and became indebted to the State of New York for a *license fee* of \$22,517.86 for the privilege of exercising its corporate franchise therein and for an *annual franchise tax* of \$441.99 based on the capital actually employed by it in that State in 1916. 8

Under Section 197 of the New York Tax Law *annual franchise taxes* become a lien upon and bind all the real and personal property of a corporation from the time when they are payable, but under Section 201 of that Law *license fees* do not become a lien on the property of a corporation unless a warrant of the State Comptroller has been issued to the Sheriff for the collection thereof, and then only from the time an actual levy is made thereunder. No warrant was ever issued for the collection of the *license fees* in question.

The State of New York presented a claim against the estate of the Delaware corporation in the hands of petitioner for said *license fees* amounting in the aggregate to \$23,515.72, and for said *annual franchise taxes*, which with interest and penalty amounted to the sum of \$843.58. In the claim it was asserted "that said taxes accrued and became a lien on all property of defendant corporation pursuant to the provisions of the Tax Law of the State of New York prior to the appointment of a Receiver herein." 9

10 The claim was heard by Hon. Augustus N. Hand, U. S. District Judge. He upheld the right of the State to a lien in respect of the annual franchise taxes because a lien therefor was imposed by Section 197, and he granted priority in payment of said sum of \$843.58 on that ground. He denied the right of the State to a lien in respect of the license fees because no lien had been acquired under the statute (the Comptroller not having issued his warrant for the collection thereof) and he allowed the sum of \$23,515.72 due to be proved only as a general claim.

11 The State of New York appealed to the Circuit Court of Appeals for the Second Circuit from so much of Judge Hand's order as disallowed its claim for lien in respect of license fees. In the Circuit Court of Appeals the State of New York abandoned the contention set up in its original claim that the amount due became a lien pursuant to the provisions of the Tax Law, and instead claimed a right to preference in payment by reason of its sovereign prerogative. The Circuit Court of Appeals, by a divided Court, upheld the claim to preference on the ground of sovereign prerogative, Judge Ward writing the prevailing opinion which was concurred in by Judge Rogers, and Judge Hough writing a dissenting opinion. A final decree was entered reversing the order of the District Court and remanding the cause. Petitioner applied to the Circuit Court of Appeals for a re-hearing which was denied.

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Reasons for the Allowance of the Writ.

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- (1) *The decision of the Circuit Court of Appeals is directly opposed to the view of this Court expressed in the case of City of Richmond vs. Bird (249 U. S., 174).*
- (2) *The decision is also contrary to the decision of the Supreme Court of Virginia in the case of Jackson Coal Company vs. Philips Line (114 Va., 40).*
- (3) *The decision is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of State of Alabama vs. Martin (256 Fed., 213).*
- (4) *The public character of the question involved.*

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The question involved affects approximately three hundred general creditors of the Delaware corporation. Although it was never adjudicated a bankrupt, the corporation is hopelessly insolvent. One dividend of 10% has been paid to the general creditors and an amount reserved in petitioner's hands sufficient to pay the State's claim for license fee in full if it should be ultimately held that the State has a priority in respect thereof. If the contention of the State is finally upheld, it will exhaust the fund in the hands of petitioner and of course work a hardship upon the general creditors as a class who have extended credit which has resulted in the creation of the fund in petitioner's hands upon which the State now seeks to establish a lien in disregard of the limitations of its own statutes. The four judges who heard the cause were equally divided in their views.

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16 For these reasons it is submitted that a writ of *certiorari* should be issued and the questions involved be determined by this Court.

Wherefore, your petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify the above cause to this Court for review and determination as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem appropriate.

H. SNOWDEN MARSHALL,
Petitioner.

A. S. GILBERT,
WM. J. HUGHES,
Counsel.

State of New York, }
County of New York, } ss.:

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H. Snowden Marshall, being duly sworn, deposes and says, that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

H. SNOWDEN MARSHALL.

Sworn to before me this }
11th day of March, 1920. }

S. S. RICHARDS,

(Seal) Notary Public,
New York County.

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We hereby certify that we have examined the foregoing petition for writ of *certiorari*, and that in our opinion such petition is well founded and should be granted by this Honorable Court, and that said petition is not filed for delay.

March 11, 1920.

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

H. SNOWDEN MARSHALL, as Receiver of
All Package Grocery Stores Company,
Petitioner,

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THE PEOPLE OF THE STATE OF NEW
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Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI.**

I.

It is axiomatic that a tax law must provide the method for its enforcement and the collection of the tax.

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The New York Tax Law* (Section 197) provides that practically every tax imposed upon corporations shall be a lien upon and bind the property of the corporation from the time that it is payable. Section 197 does not include

*The relevant sections of the New York Tax Law, viz., Sections 181, 197 and 201, are printed as an appendix to the brief.

license fees from foreign corporations—these are covered by Section 201 under which the lien does not accrue unless a warrant for the collection of the license fee has been issued to the Sheriff and then only from the time an actual levy is made under such warrant. 25

A method for the collection of the license fee therefore is specifically prescribed, namely by the issue of a warrant and a levy thereunder.

The State of New York was not obliged to make this distinction between corporation taxes generally and license fees. It could have imposed upon foreign corporations for the privilege of doing business therein any condition it saw fit (*Home Ins. Co. vs. New York*, 134 U. S., 594). It could have provided, as Ohio and other equally sovereign states have done, namely, that the fees, taxes and penalties, required to be paid, shall be the first and best lien on all property of the corporation, whether such property is employed by the corporation in the prosecution of its business or is in the hands of an assignee, trustee or receiver for the benefit of the creditors and stockholders thereof (*Ohio Tax Law of 1911, Sec. 117*). But it did no such thing. It invited foreign corporations to come into and transact business within its borders and fixed the condition therefor. As a penalty for failure to pay the license fee, the State closes the doors of its courts to such delinquent foreign corporations and renders contracts made by them unenforceable therein. The statute was notice to creditors dealing with such corporation that, so far as the State's claim for license fee was concerned, the corporation's property was not subject to any lien superior to their rights as general creditors save and excepting only upon the performance of certain conditions precedent upon the part of the State, which in the instant case were not performed. 26 27

II.

The decision of the Circuit Court of Appeals is opposed to the view of this Court expressed in the case of *City of Richmond vs. Bird* (249 U. S., 174), and by the Supreme Court of Virginia in the case of *Jackson Coal Co. vs. Phillips Line* (114 Va., 40).

29 In the case of *City of Richmond vs. Bird*, this Court approved the doctrine laid down in *Jackson Coal Co. vs. Phillips Line*, and took the view that the State of Virginia having by its statutes fixed the method for the collection of a tax, and the conditions imposed by the statute not having been complied with on the part of the State, the latter was in no better position than a general creditor where the property of the corporation had passed into the hands of the receiver. That is precisely the situation here. The Comptroller of the State of New York might have issued his warrant to the Sheriff for the collection of the license fee and the Sheriff might have made an actual levy under the warrant, whereupon a lien would have accrued. This, however, was not done. The State took no proceeding whatever to enforce the collection of the license fees and the property of the corporation passed into the hands of the Receiver free of any lien under the statute. Notwithstanding this fact, the State now claims a *lien* by
30 virtue of its sovereignty, but as Judge Hough in his dissenting opinion says:

"Sovereignty over what? Certainly not over the insolvent corporation, which is of another State, and not over this Court (as I suppose), but over the corporate property because it is physically situated in

New York. In other words, when, as here, the State has no lien affecting its debtor's *res*, its sovereignty is brought forward to operate *in rem*." 31

III.

The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *State of Alabama vs. Martin* (256 Fed., 213).

In *State of Alabama vs. Martin*, the Court held that the claim of the State of Alabama against a bankrupt corporation for the hire of convicts, was not entitled to priority of payment. The Court said: 32

"The Common Law of England so far as not inconsistent with the Constitution Laws and institutions of Alabama prevails in that State. • • • It is claimed that the State had the priority which the Common Law accorded to debts owing to the sovereign. There are Alabama statutes the enactment and existence of which seem to us to be inconsistent with the hypothesis that the priority claim exists under the law of that State."

The Court then enumerates several classes of debts of decedents' estates, which have priority over taxes. In other words, the Court held that the State of Alabama had by its own statutes waived any claim to priority which it might have asserted on the ground of its sovereign prerogative. An analogous situation exists in the instant case. As pointed out, the State of New York might have 33

- 84 made the license a lien as soon as it became due, just as it made corporation taxes generally a lien, but when it expressly postponed the accruing of the lien it waived any claim it might possibly have asserted on the ground of its sovereign prerogative. If this is not so, then the language of Section 201 is meaningless surplusage.

IV.

The matter in controversy is one of general jurisprudence.

- 85 The State of New York in its claim *presented to the District Court* asserted a lien under the statute. The statutory conditions not having been complied with, obviously no lien existed under the statute. The State abandoned that theory in the *Circuit Court of Appeals* and relied solely upon its right as a sovereign. There was, therefore, no question of statutory construction in respect of which the Circuit Court of Appeals might be bound by the decisions of the State court. Nor was the Circuit Court of Appeals precluded from the exercise of an independent consideration of the case by any *rule of property* laid down by a New York Court. This Court has defined rules of property as rules relating to *real estate* (*Kuhn vs. Fairmont Coal Co.*, 215 U. S., 349-360).

The public character of the question involved.

Quite aside from the fact that the decision in this case affects the rights of several hundred general creditors of the Delaware corporation, the question is invested with a public character by reason of the extraordinary nature of the claim asserted by the State against the citizen of another and equally sovereign State. The State of New York invites foreign corporations to come within its borders under the terms of a statute which it now claims it has the right to repudiate, as expediency may suggest, although it still remains upon its statute books. This, it is submitted, is a dangerous doctrine, repugnant to the principles of comity which should exist between States, and in the public interest the question whether such a doctrine is controlling upon the Federal Courts should be definitely determined by this Court.

VI.

The prayer of the petitioner should be granted.

Respectfully submitted,

A. S. GILBERT,
WM. J. HUGHES,
Counsel for Petitioner.

APPENDIX.

"Sec. 181. LICENSE TAX ON FOREIGN CORPORATION

Every foreign corporation, except banking corporation, fire, marine, casualty and life insurance companies, cooperative fraternal insurance companies, and building and loan associations, doing business in this State, shall pay to the state treasurer, for the use of the state, a license fee of one-eighth of one per centum for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this state to be computed upon the basis of the capital stock employed by it within this state, during the first year of carrying on its business in this state; which first payment shall not be less than ten dollars; and if any year thereafter any such corporation shall employ more than eight thousand dollars of its capital stock within this state on which a license fee has not been paid then a license fee at the rate of one-eighth of one per centum shall be due and payable upon any such increase. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business. For purposes of taxation, the capital of a corporation invested in the stock of another corporation shall be deemed to be assets located where the physical property represented by such stock is located. The amount of capital upon which such license fees shall be paid shall be fixed by the state tax commission, which shall have the same authority to examine the books and records in this state of such foreign corporations, and the employees thereof as it has in the case of domestic corporations and the comptroller shall have the same power to issue his warrant for the collec-

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tion of such license fees, as he now has with regard to 43
domestic corporations. No action shall be maintained or
recovery had in any of the Courts in this state by such
foreign corporation after thirteen months from the time
of beginning such business within the state, without ob-
taining a receipt from the comptroller for the payment
of the license fee upon the capital stock employed by it
within this state during the first year of carrying on its
business in the state."

"Sec. 197. PAYMENT OF TAX AND PENALTIES FOR
FAILURE. A tax imposed by Section one hundred and
eighty-two¹ or one hundred and eighty-six² of this chapter
shall be due and payable into the state treasury on or
before the fifteenth day of January in each year. A tax 44
imposed by section one hundred and eighty-four of this
chapter on a transportation or transmission corporation,
or by section one hundred and eighty-five, on elevated rail-
roads or surface railroads not operated by steam, shall be
due and payable into the state treasury on or before the
first day of August in each year. A tax imposed by section
one hundred and eighty-seven of this chapter on an insur-
ance corporation shall be due and payable into the state
treasury on or before the first day of June in each year.
A tax imposed by section one hundred and eighty-eight³,
one hundred and eighty-eight-a⁴ or one hundred and eighty-
nine⁵ shall be due and payable into the state treasury on
or before the first day of September in each year. A tax
imposed by section one hundred and ninety-one of this 45

1. Annual franchise tax on domestic and foreign corporation gen-
erally.
2. Franchise tax on water-works companies, gas companies, elec-
tric or steam heating, lighting and power companies.
3. Franchise tax on trust companies.
4. Taxation of investment companies.
5. Franchise tax on savings banks.

- 46 chapter on a foreign banker shall be due and payable to the state treasury on or before February first in each year. If such tax in any case is not paid within thirty days after the same becomes due, or if the report of any such corporation is not made within the time required by this article, the corporation, association, joint-stock company, person or partnership, liable to pay the tax, shall pay into the state treasury, in addition to the amount of such tax, a sum equal to five per centum thereof, and one per centum additional for each month the tax remains unpaid, which sum shall be added to the tax, and paid or collected therewith. Every corporation, association, joint-stock company, person or partnership failing to make the annual report required by this article, or failing to make an special report required by the commission, within an reasonable time to be specified by the commission, shall forfeit to the people of the state the sum of one hundred dollars for every such failure, and the additional sum of ten dollars for each day that such failure continues. *Such tax shall be a lien upon and bind all the real and personal property of the corporation, joint-stock company or association liable to pay the same from the time when it is payable until the same is paid in full.*
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Sec. 201. WARRANT FOR THE COLLECTION OF TAXES. After the expiration of thirty days from the sending by the commission of a notice of a statement of an account as provided in this article, unless the amount of such account shall have been paid or deposited with the state treasurer, if an appeal or other proceedings have been taken to review the same, and the undertaking given as provided in this article, the comptroller may issue a warrant under his hand and official seal, directed to the sheriff of any county

of the state, commanding him to levy upon and sell the real and personal property of the person, partnership, company, association or corporation against which such account is stated, found within his county for the payment of the amount thereof with interest thereon and costs of executing the warrant, and to return such warrant to the comptroller and pay to the state treasurer the money collected by virtue thereof, by a time to be therein specified, not less than sixty days from the date of the warrant. *Such warrant shall be a lien upon and shall bind the real and personal property of the person, partnership, company, association or corporation against which it is issued, from the time an actual levy shall be made by virtue thereof.* The sheriff to whom any such warrant shall be directed shall proceed upon the same in all respects, with like effect, and in the same manner as prescribed by law in respect to executions issued against property upon judgments of a Court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner."

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Respondent.

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To Honorable Charles D. Newton, Attorney General of the
State of New York, and to the above named re-
spondent:

Please take notice that we shall file in the Office of the
Clerk of the Supreme Court of the United States the fore-
going petition for writ of *certiorari* and brief, together with
the printed record of the above entitled cause, and that
we shall, on the 29th day of March, 1920, submit the peti-
tion to the Court.

A. S. GILBERT,

WM. J. HUGHES,

Counsel for Petitioner.

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Received a copy of the foregoing notice and of the peti-
tion for writ of *certiorari* and brief referred to therein, this
day of March, 1920.

Attorney General of the State of New York,
Counsel for Respondent.